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6 **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

8 In The Matter of:

9 AMENDED Sua Sponte  
10 Petition to Amend Rule 6.8(a) and  
11 (c), Arizona Rules of Criminal  
12 Procedure

No. R-09-0033

Comment of the State Capital Post  
Conviction Public Defender

13 The State Capital Post Conviction Public Defender hereby submits its comment  
14 to the proposed amendment to Rule 6.8(c), Arizona Rules of Criminal Procedure:

15 The Court is understandably frustrated with the ability to attract qualified  
16 attorneys to represent death row inmates in post conviction proceedings. The office  
17 established to represent inmates in these proceedings is severely underfunded and  
18 only able to represent a few clients at a time. The budget crisis in Arizona has  
19 intensified the problem. The PCR office has suffered a budget reduction of 33%  
20 within a two year period. It has been forced to implement an inordinate number of  
21 furloughs, has relied on a grant from ACJC which will likely not be renewed for FY  
22 2011, and has run out of funds for experts before the end of the fiscal year.  
23 Moreover, compensation for privately appointed counsel is less than it should be.

24 The Court should not widen the pool of 'qualified' counsel, however, without  
25 assuring the quality of appointed counsel. The PCR office has seen how the failure  
26 to assure the competence of trial counsel has affected the representation. In one case,  
27 the Court appointed an attorney who had previously resigned in lieu of disbarment  
28 for, among other things, lying to his client and his employer in connection with

1 whether work had been done, and, after a default had been entered against his client,  
2 attempting to deflect blame by forging his paralegal's signature and notary stamp on  
3 a document filed with the court. In another case, appointed counsel previously had  
4 been found to have rendered ineffective assistance of counsel in a non-capital  
5 juvenile sentencing by the Arizona Court of Appeals and received a censure from the  
6 bar for that conduct. If the Court is going to amend the Rule to widen the scope of  
7 available lawyers, it should enact measures designed to ensure that only competent  
8 and able counsel are appointed. This function is not a 'numbers game' but requires,  
9 as well, a qualitative assessment.

### 11 **Bifurcating the qualifications**

12 Bifurcating the qualifications of appellate and post-conviction counsel makes  
13 sense. Appellate counsel need not have the skills necessary to conduct evidentiary  
14 hearings.

### 16 **Substitution of trial experience for post-conviction experience**

17 Proposed Rule 6.8(c)(2) allows for the substitution of trial experience for post-  
18 conviction evidentiary hearing experience which, at first blush, seems fine. The skills  
19 needed to conduct an evidentiary hearing encompass some of the skills required to  
20 try a case. However, unlike some of the other qualifications which are designed to  
21 ensure that appointed counsel has experience in either one death penalty case or  
22 felony cases, there is no such requirement in the current proposal. The conduct of  
23 two misdemeanor trials qualifies one to serve as capital post conviction counsel in a  
24 death penalty case under this proposal. Moreover, the evidentiary hearing in a capital  
25 case is likely to include complex mental health issues, among others, which are  
26 generally not present in a trial. By way of contrast, Rule 8.605, California Rules of  
27

1 Court, requires, in addition to appellate or post conviction work, “three jury trials or  
2 three habeas corpus proceedings involving serious felonies.” *See*, also, Article  
3 26.052, Texas Code of Criminal Procedure (requiring, among other things,  
4 participation in at least fifteen felony cases tried to verdict, at least ten of which were  
5 for serious offenses (known as “3g” offenses)); Rule 37.5, Arkansas Rules of  
6 Criminal Procedure (requiring post-conviction experience); Rule 22(d)(5),  
7 Mississippi Rules of Appellate Procedure (similar to current Arizona rule).

### 8 9 **No Post Conviction Experience**

10 While the proposed change to Rule 6.8(c)(1) [for appellate counsel] removes  
11 post conviction experience from the qualifications, the proposed change to Rule  
12 6.8(c)(2) [for post-conviction counsel] continues to permit the substitution of  
13 appellate experience for post-conviction experience in the second sentence of the  
14 proposed amendment. This proposal permits counsel with no post-conviction  
15 experience to be appointed in a capital post-conviction case so long as she has the  
16 requisite number of appeals and trials. An attorney with no post conviction  
17 experience should not be appointed to a capital post conviction case.

### 18 19 **Capital Case Oversight Committee**

20 The amended proposal was not considered by the Capital Case Oversight  
21 Committee. At its last meeting, the Committee was addressed by the Capital Case  
22 Monitor for the California Supreme Court, Robert Reichman, to discuss that court’s  
23 process for appointing and monitoring counsel in capital post-conviction cases  
24 (referred to, there, as ‘state habeas’). Mr. Reichman made some comments which are  
25 noteworthy here. We have supplemented the comments with some provisions from  
26 Rule 8.605.

1           1) The Court tries to avoid the appointment of busy trial lawyers because they  
2 tend to be occupied with other tasks and do not always have the time necessary to  
3 adequately represent habeas petitioners.

4           2) The Court requires consultation with and assistance by the California  
5 Appellate Project (CAP). After appointment, the attorney is partnered with a “buddy”  
6 attorney at CAP for consultation on legal and procedural matters.

7           3) The Court has a mechanism for appointing “lead” counsel and “associate”  
8 counsel. Lead counsel is responsible for the overall conduct of the case and for  
9 supervising the work of appointed associate counsel. (As we understand it, the  
10 Arizona Supreme Court only appoints one lawyer. The appointment of associate  
11 counsel is left to the discretion of the Superior Court and, anecdotally, it appears that  
12 associate counsel is generally not appointed.)

13           4) The California Supreme Court requires the assisting attorney/entity to report  
14 to it periodically on case progress, and whether appointed counsel should be appointed  
15 to other cases, serving as a quality control check on appointed counsel.

16           5) Lawyers seeking appointment must provide three writing samples presenting  
17 an analysis of complex legal issues (typically, this will be two appellate briefs and  
18 one habeas corpus petition), at least two references, and demonstrate proficiency in  
19 capital law (*e.g.*, issue identification, research, analysis, writing, and advocacy) prior  
20 to receiving an appointment. The Court conducts a qualitative review of the  
21 candidate and considers the evaluation of an assisting counsel / entity if counsel had  
22 previously been appointed in a capital case. Mr. Reichman reported that  
23 approximately two-thirds of those who apply are found to be unqualified.

### **The Need for Quality Assurance**

26           The proposed rule change does not address the need for quality control and  
27  
28

1 permits, on numbers alone, the appointment of counsel with no capital experience  
2 and/or with no post conviction experience. There is no mechanism to supervise the  
3 work or to assess the work product.

4 The Supreme Court used to maintain a panel to qualitatively assess applications  
5 from lawyers who sought appointments to these cases. That panel should exist under  
6 the current rule, but does not. The current effort to widen the pool suggests that the  
7 need for such a panel would be greater if the amendments are made. The panel could  
8 serve the same function as the California Capital Appeals Monitor. The number of  
9 trials, appeals or hearings does not make an attorney qualified, nor does it inform  
10 anyone whether the attorney is dedicated to or has a history of providing high quality  
11 legal services as required by Rule 6.8(c) and the ABA Guidelines. *See* ABA  
12 Guideline 3.1(E) (various sections require that counsel's work be monitored, that the  
13 list of qualified attorneys be reviewed to withdraw certification for poor performing  
14 attorneys, and that complaints be monitored and investigated).

### 15 16 **Conclusion**

17 The Court should not broaden the pool of "qualified" lawyers without  
18 establishing a formal mechanism to screen the applicants prior to each appointment  
19 and to monitor and assess the work of appointed counsel.

20  
21 RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of May, 2010.

22 OFFICE OF THE STATE CAPITAL  
23 POST CONVICTION PUBLIC DEFENDER

24 By: /s/  
25 Martin Lieberman

1 This comment e-filed  
2 this 19<sup>th</sup> day of May, 2010,  
3 with the Arizona Supreme Court

4 Copy mailed this date to:

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14 By: \_\_\_\_\_